Supreme Court, U.S.
FILED
MAY 21 2007
OFFICE OF THE CLERK

(2)

No. 06-1387

IN THE

Supreme Court of the United States

JOSEPH F. HUTCHISON, *et al.*,

Petitioners,

v.

FIFTH THIRD BANCORP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

PATRICK F. FISCHER
Counsel of Record
JOSEPH M. CALLOW, JR.
SUE A. ERHART
KEATING MUETHING & KLEKAMP PLL
One East Fourth Street, Suite 1400
Cincinnati, Ohio 45202
(513) 579-6400

Counsel for Respondent

208776

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Does ERISA's preemption clause, 29 U.S.C. § 1144(a) (ERISA § 514(a)), allow ERISA plan participants who brought a claim under the ERISA civil enforcement provisions, 29 U.S.C. § 1132(a)(1)(B) (ERISA § 502(a)(1)(B)), which was adjudicated on the merits, to duplicate and attempt to reassert the same claim under state contract law?

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, Fifth Third Bancorp, has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT PURSUANT TO SUPREME COURT RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
STATEMENT OF CASE	1
CLARIFICATION OF FACTUAL RECORD	2
CLARIFICATION OF PROCEDURAL POSTURE	5
REASONS FOR DENYING THE PETITION	11
I. The Court's Recent Unanimous Decision In *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004) Establishes The Legal Framework For Analyzing ERISA Preemption And There Is No Post-Davila Split In The Circuits.	12
II. The Sixth Circuit Followed and Applied *Davila* in the Underlying Decision.	15
III. There Is No Circuit Split Regarding Any Supposed "Dual Capacity Doctrine" Requiring Clarification By This Court.	17

Contents

	Page
A. This Court has limited, and not expanded, *Pegram.*	18
B. Petitioners' Reliance on Pre-*Davila* Case Law is Misplaced.	19
C. Allowing Petitioners' State Law Breach of Contract Claim to Proceed Would Defeat the Fundamental Purpose of ERISA Preemption.	21
CONCLUSION	22
APPENDIX — Order Of The United States District Court For The Southern District Of Ohio, Western Division Dated October 7, 2005	1a

TABLE OF CITED AUTHORITIES

Page

Cases:

Abraham v. Norcal Waste Systems, Inc., 265 F.3d 811 (9th Cir. 2001) 19

Aetna Health Inc. v. Davila, 542 U.S. 200 (2004) .. *passim*

Briscoe v. Fine, 444 F.3d 478 (6th Cir. 2006) 17

Bennett v. Contrail, 168 F.3d 671 (3d Cir. 1999) .. 3

Haliburton Co. Benefits Committee v. Graves, 463 F.3d 360 (5th Cir. 2006) 20, 21

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) 7, 8

Hutchison v. Fifth Third Bancorp, 469 F.3d 583 (6th Cir. 2006) ..... *passim*

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) 13

Lockheed Corp. v. Spink, 517 U.S. 882 (1996) 7

Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58 (1987) 13, 21

Pegram v. Herdrich, 530 U.S. 211 (2000) 18, 19

Cited Authorities

Page

Penny/Ohlmann/Nieman, Inc. v. Miami Valley Pension Corp., 399 F.3d 692 (6th Cir. 2005) .. 17, 20, 21

Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987) 13

Shaw v. Delta Air Lines, 463 U.S. 85 (1983) 13

Somners Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc., 793 F.2d 1456 (5th Cir. 1986) 19

Sprague v. General Motors Corp., 133 F.3d 388 (6th Cir. 1998) 8

Statutes:

26 U.S.C. § 414(1) 8

29 U.S.C. § 1132(a)(1)(B) ..... i, 1, 13

29 U.S.C. § 1144 15

29 U.S.C. § 1144(a) i

Regulation:

26 C.F.R. § 1.401(a)(31) 8

STATEMENT OF CASE

This case presents no basis for certiorari review. This Court recently addressed and defined the scope of ERISA preemption in *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004). In deciding this case, the Sixth Circuit simply applied and followed *Davila*. *Hutchison v. Fifth Third Bancorp*, 469 F.3d 583 (6th Cir. 2006).

In *Davila*, this Court determined whether specific causes of action fell "within the scope" of the civil enforcement provisions of ERISA § 502(a). This Court held that "any state law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore preempted." *Davila*, 542 U.S. at 209. In this case, Petitioners' so-called breach of contract claim directly involves Fifth Third's administration, amendment, and allocation of plan assets. Thus, it obviously relates to an employee benefit plan and clearly falls within the scope of ERISA preemption as outlined in *Davila*.

As the Sixth Circuit Court of Appeals recognized, the District Court ruled on the merits of Petitioners' ERISA breach of fiduciary duty claim and Petitioners did not appeal that adverse ruling. Nonetheless, in an effort to attack the District Court's ruling on the merits of the ERISA claim, Petitioners are re-characterizing their ERISA breach of fiduciary duty claim as a state law breach of contract claim in a desperate effort to circumvent the broad scope of ERISA preemption and the District Court's now non-appealable Order. As the Sixth Circuit Court of Appeals below recognized, regardless of the characterization of the claim and regardless of the relief sought, ERISA preemption applies

because Petitioners "directly challenge a specific employment benefit structure and seek to regulate an ERISA plan in the sense that the Supreme Court contemplated in *Davila*." *Hutchison,* 469 F.3d at 583 [Pet. at 15a].

Finally, Petitioners ask this Court to resolve a non-existent split among the circuits regarding an alleged "dual capacity" doctrine – a doctrine that is defined nowhere in Petitioners' Petition much less referred to any case law. No circuit court of appeals has identified and adopted a "dual capacity doctrine" and there is no split among the circuits. At best, the "dual capacity" doctrine is Petitioner's subjective characterization of general ERISA preemption analysis. Importantly, there is no conflict in the underlying ERISA preemption legal analysis in the cases cited by Petitioners, and certainly no post-*Davila* split of authority regarding the applicable legal analysis requiring this Court to revisit the issues at this time. No new question is presented and *Davila* authoritatively prevents Petitioners from duplicating the ERISA civil enforcement provisions, which they have already availed themselves of, with a state law contract claim.

At bottom, Petitioners simply dispute the application of ERISA preemption analysis to the facts of this case. Such disputed application of fact does not warrant certiorari review by this Court.

CLARIFICATION OF FACTUAL RECORD

Petitioners are former employees of Suburban Bancorporation, Inc. ("Suburban") who were also participants in a Suburban ESOP, an employee benefit plan subject to ERISA. An ESOP is generally created when an employer

loans the ESOP funds to purchase shares of the employer's stock to insure that the ESOP has a reserve of stock to make available to employees in future years. The purchased shares of stock are held in a suspense account, which also acts as collateral for the employer's loan until such time as the employer makes contributions to the ESOP on behalf of its employees. The shares are then released from the suspense account and annually allocated to the plan participants after the ESOP receives contributions from the employer and after the ESOP makes a loan repayment. ESOPs are established in this manner to provide assurances that there will be shares of the employer's stock available for allocation in the future. Significantly, however, until shares are released from the suspense account, no employee has any right whatsoever to the shares. *See Bennett v. Contrail*, 168 F.3d 671, 677 (3d Cir. 1999).

In July of 1997, Suburban merged into Fifth Third Bancorp. At the time of the merger, the Suburban ESOP had plan assets in the suspense account not yet allocated to any plan participants. In negotiating the merger, Suburban representatives wanted time to determine if they could make further contributions to the Plan and then distribute all of the shares in the Suburban suspense account to current Suburban employees. To effect the merger, Suburban and Fifth Third entered into an "Affiliation Agreement." The Affiliation Agreement included provisions addressing how the parties were to handle the ESOP, both before completion of the corporate merger and afterwards. These provisions specifically addressed such matters as the administration of the ESOP, the amendment and termination of the ESOP, contributions to the ESOP, and distributions from the ESOP. Significantly, the Affiliation Agreement made clear that any

contribution or distribution by Suburban must comply with applicable ERISA and IRS requirements.

Section V.E.(1) of the Affiliation Agreement outlined Suburban's obligations with regard to its attempt to maximize the distributions in the ESOP. Suburban was obligated to either obtain a determination from the IRS that the distribution of shares from the suspense account in the ESOP, as amended, satisfied relevant tax provisions or an IRS determination letter approving such a distribution.[1] In other words, Fifth Third gave Suburban an opportunity to distribute as many shares as possible from the suspense account but only if certain strict conditions were met – including that the distribution was legal.

It is undisputed, and the District Court explicitly found, that Suburban failed to complete all of the steps outlined in Section V.E.(1) of the Affiliation Agreement to allow for distribution of any or all of the shares from the ESOP suspense account. Specifically, the District Court found that Suburban never obtained IRS approval or an IRS determination letter approving a reversion of shares and Fifth Third did not transfer shares from the suspense account to another Fifth Third Plan. *See* October 7, 2005 Order at 10-12.[2] Thus, the suspense account continued to hold shares even after the merger.

After the merger, Fifth Third became the successor ESOP sponsor and trustee. After Suburban failed to meet the deadlines agreed to in the Affiliation Agreement, Fifth Third amended the ESOP under its amendment authority explicitly provided in the plan documents and Affiliation Agreement.

[1] Section V.E.(1) is printed in its entirety at 48a-50a.

[2] Respondents attach the October 7, 2005 Order to this Brief in Opposition as it was omitted from Petitioners' Petition.

Fifth Third added new participants to the plan, which allowed Fifth Third to distribute all shares in the suspense account to plan participants, and then exercised its authority to terminate the plan.

CLARIFICATION OF PROCEDURAL POSTURE

Petitioners have failed to provide the Court with all applicable District Court orders and a complete procedural history of this case, and have made several misstatements in their Petition, requiring this clarification.

Petitioners originally filed a complaint against Fifth Third in state court, alleging several state law claims (including breach of contract claims related to the Affiliation Agreement) and a claim for breach of fiduciary duty pursuant to ERISA. Fifth Third removed the case to federal court on the basis of Petitioners' ERISA claim. After removal, Petitioners attempted to dismiss the ERISA breach of fiduciary duty claim and sought remand of the state law claims. By Order dated August 6, 2002, the District Court denied the motion to remand and found that the state law claims were preempted. Petitioners thereafter filed an amended class action complaint asserting the same state law claims and ERISA breach of fiduciary duty claims contained in their original state court filing. By Order dated March 11, 2003, the District Court again concluded that Petitioners' state law claims were preempted for the reasons identified in its prior August 6, 2002 Order. Petitioners then filed a second amended complaint that asserted only an ERISA breach of fiduciary duty claim.

Petitioners filed a motion for reconsideration of the Court's March 11, 2003 Order and asked the District Court to reinstate their state law breach of contract (Affiliation Agreement) claim – and not any other state law claim originally asserted. By Order dated October 5, 2005, the District Court denied Petitioners' motion for reconsideration and reaffirmed – for the third time – that Petitioners' state law breach of contract claim was preempted. The District Court held that "ERISA has traditionally been interpreted broadly to preempt any state law claim that relates to an employee benefit plan" and that "the only state law claims not preempted by ERISA were those whose connection to the plan are merely remote, tenuous, or peripheral." October 5, 2005 Order at 4 [Pet. at 22a]. The District Court reasoned,

> In this case, assuming for purposes of the present motion that Plaintiff's breach of contract claim would not provide an alternative benefit structure, constitute an alternative enforcement mechanism, or regulate the plan itself, the claim is still preempted because it implicates the relations among traditional plan entities. . . . Plaintiffs' breach of contract claim involves and implicates the relations of quintessential plan entities – the plan beneficiaries and the employer.

October 5, 2005 Order at 6 [Pet. at 24a].

As previously discussed, the District Court also granted Fifth Third's motion for summary judgment on Petitioners' ERISA breach of fiduciary duty claim by separate order dated October 7, 2005 – an order that Petitioners did not appeal and did not reference or discuss in their Petition. The District

Court separately addressed the merits of Petitioners' ERISA breach of fiduciary duty claim and made multiple, non-appealed findings in ruling against Petitioners and in favor of Fifth Third:

> Plaintiffs claim that Fifth Third breached its fiduciary duty to the original ESOP participants by amending the plan to allow a distribution of plan assets to new Fifth Third employee-participants.
>
> It is well-established, however, that an employer does not act in a fiduciary capacity when it adopts plan amendments. *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996). Therefore, Fifth Third cannot be held liable for breach of fiduciary duty for the mere fact that it amended the ESOP to allow new participants into the ESOP. *Spink*, 517 U.S. at 890; *see also Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 442-44 (1999).
>
> * * *
>
> . . . This record demonstrates, however, that Fifth Third did not breach its fiduciary duty to Plaintiffs. Assuming without deciding that the Affiliation Agreement became one of the terms of the ESOP, and it was the intent of the agreement that the ESOP should benefit only the original participants, Fifth Third still committed no fiduciary breach when it amended the plan as it did. It is undisputed that in the plan document,

the employer reserved the right to amend any or all of the plan's provisions at any time. *See* Doc. No. 71, Ex. 4, Plan Document § 16.1. As the Court noted in *Sprague v. General Motors Corp.,* 133 F.3d 388 (6th Cir. 1998), it is not incompatible, and certainly no breach of fiduciary duty, to extend the promise of a benefit in one hand while reserving the right to withdraw the benefit in the other. *Id.* at 401. Hence, there was no breach of fiduciary duty by Fifth Third even assuming the plan amendments disregarded the intent allegedly expressed in the Affiliation Agreement.

Again assuming that the Affiliation Agreement became one of the terms of the ESOP, Fifth Third was not obligated to pay Plaintiffs for the distributed suspense shares. Fifth Third was only required to pay Plaintiffs if plan assets reverted to Fifth Third or were transferred to another Fifth Third plan. The assets clearly did not revert to Fifth Third because they were distributed among the group of employee-participants. Moreover, as Fifth Third correctly points out, amending the plan to allow additional participants does not create a new plan. *Hughes,* 525 U.S. at 442-43. Lastly, even though some ESOP participants rolled over their ESOP distributions to other Fifth Third retirement plans, this is not considered to be a transfer of plan assets to another plan. *See* 26 C.F.R. § 1.401(a)(31)-1 (2005); 26 U.S.C. § 414(1). Thus, there was no transfer of plan assets

> which triggered a duty by Fifth Third to pay Plaintiffs.

October 7, 2005 Order at 9-12 [Resp. at 9a-12a].[3]

The District Court's October 7, 2005 Order is significant because Petitioners' presentation of facts ignores and misrepresents several factual findings that the District Court has already made. For example, Petitioners state that "in May, 1999, Fifth Third did make such a transfer by amending the ESOP." Petition at 3. To the contrary, the District Court specifically held that "there was no transfer of plan assets" as referenced above. October 7, 2005 Order at 12 [Resp. at 12a]. Petitioners also state that the plan amendments "no doubt triggered its contractual obligation to pay Petitioners the value of the remaining plans assets out of its corporate assets." Petition at 15 n.7. But the District Court specifically found otherwise, concluding that the obligation was not triggered because, as a matter of fact and law, there was no "reversion" or "transfer" of shares, under the Affiliation Agreement – a condition precedent to trigger the actions Petitioners sought. October 7, 2005 Order at 11-12 [Resp. at 11a-12a].

---

[3] The District Court also rejected Petitioners' request for the creation of an equitable "resulting trust" – holding that because there was no breach of fiduciary duty by Fifth Third, there was no basis to awarding any equitable relief like a resulting trust. October 7, 2005 Order at 10-11 [Resp. at 10a-11a]. Contrary to Petitioners' representation, the claims were not "abandoned" (Petition at 4 n.2) but were adjudicated on the merits against Petitioners and abandoned by Petitioners on appeal.

The District Court also denied Petitioners' motion for class certification as moot – no class was ever certified by the District Court. October 7, 2005 Order at 12 [Resp. at 12a].

Petitioners also misrepresent that they "abandoned their ERISA claim" in subsequent District Court proceedings. Petition at 4 n.2. This statement is wholly untrue. Extensive discovery was conducted on this claim and Fifth Third moved for summary judgment at the close of that discovery. The District Court granted Fifth Third's motion for summary judgment on Petitioners' sole ERISA claim and specifically held: (a) Fifth Third was not liable for the mere fact that it amended the ESOP to allow new participants into the ESOP; (b) Fifth Third did not engage in a prohibited transaction with a party or parties in interest when it amended the plan and distributed the ESOP assets to new participants; (c) the record demonstrated that Fifth Third did not breach any fiduciary duty owed to Petitioners; (d) Fifth Third did not breach any provision of Fifth Third's decisions regarding the Affiliation Agreement because the preconditions to distribution were not met, and therefore granted Fifth Third's motion for summary judgment on the Petitioners' ERISA breach of fiduciary duty claim. October 7, 2005 Order at 9-12 [Resp. at 9a-12a]. Petitioners did not "abandon" their ERISA claim – they lost it on the merits.

Having lost on the merits of the ERISA claim, Petitioners seek to recast their claims as a state law breach of contract claim hoping for a second chance to relitigate the same issues. Petitioners' procedural gamesmanship was appropriately recognized and rejected by the Sixth Circuit:

> Hutchison brought an ERISA claim in addition to the class members' state-law claims. The district court dismissed the ERISA claim, and Hutchison does not appeal that decision. ERISA prevents class members from re-casting their ERISA claim as a breach of contract claim by simply rephrasing

> the source of Fifth Third's obligations. *Davila,* 542 U.S. at 214.

Hutchison, 469 F.3d at 590 [Pet. at 16a].

If ERISA preemption means anything at all, it must mean that a plaintiff cannot proceed with an ERISA breach of fiduciary duty claim, lose on the merits, and then attempt to proceed under the auspices of state law on a claim based on the same language and the same conduct already reviewed by the Court. It is obvious that to allow Petitioners to pursue a state law contract claim would be to allow ". . . a state law cause of action that duplicates . . . the ERISA civil enforcement remedy. . . ." *Davila,* 542 U.S. at 209. Petitioners would be relying on the exact same language already interpreted by the District Court in adversely adjudicating Petitioners' ERISA civil enforcement action to be interpreted in a state law cause of action. This fits squarely within this Court's existing ERISA preemption precedents without the need for this Court to provide any further clarification.

REASONS FOR DENYING THE PETITION

The underlying decision does not conflict with a decision of this Court or any other court of appeals and does not present a federal question that has not already been decided by this Court. Petitioners have not carried their burden of demonstrating any compelling reasons for the Petition to be granted.

I. THE COURT'S RECENT UNANIMOUS DECISION IN *AETNA HEALTH INC. V. DAVILA*, 542 U.S. 200 (2004) ESTABLISHES THE LEGAL FRAMEWORK FOR ANALYZING ERISA PREEMPTION AND THERE IS NO POST-DAVILA SPLIT IN THE CIRCUITS.

The Court's recent unanimous decision in *Aetna Health Inc. v. Davila,* 542 U.S. 200 (2004) is controlling and dispositive of the Petition. In *Davila,* the Court recognized that Congress enacted ERISA: (a) to protect the interests of participants in employee benefit plans and their beneficiaries by setting out substantive regulatory requirements for employee benefit plans; and (b) to provide for appropriate remedies, sanctions, and ready access to the federal courts. *Id.* at 208. The purpose of ERISA was to provide an uniform regulatory regime over federal benefit plans – "ERISA includes expansive preemption provisions which are intended to ensure that employee benefit plan regulation would be exclusively a federal concern." *Id.*

> The detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. The six carefully integrated civil enforcement provisions found in

> 502(a) of the statute as finally enacted provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.
>
> **Therefore, any state law cause of action that duplicates, supplements or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore preempted.**

Id. at 208-09 (emphasis added) (*quoting Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54-56 (1987)). This Court concluded that the ERISA civil enforcement mechanism is one of those provisions with such "extraordinary pre-emptive power" that it "converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Davila*, 542 U.S. at 209. If an individual could have brought her claim under ERISA § 502(a)(1)(B), the cause of action is preempted. *Id.* at 210; *see also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990) (holding that "[a] law relates to an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan"); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987); *Dedeaux*, 481 U.S. at 41, 50-54 (holding that § 502(a)(1)(B) preempts state common law contract and tort claims because allowing such claims would upset the carefully crafted remedial balance set forth in § 502(a)); *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983) (holding that ERISA preemption to be applied broadly, such that a law "relates to" an employer benefit plan "if it has a connection with or reference to such a plan"). A court should review the nature of the complaint, the statute or basis for

the claims, and the various plan documents to determine whether ERISA preemption applies. *Davila,* 542 U.S. at 211.

Under *Davila*, the broad scope of ERISA preemption is clear when reviewing the reasoning supporting the Court's reversal of the Fifth Circuit Court of Appeals' decision which concluded that those respondents' claims were not preempted. The court of appeals found significant that those respondents were asserting tort claims and not seeking reimbursement of benefits – but this Court rejected this distinction, holding that distinguishing between preempted and non-preempted claims based on the particular label affixed to them "would elevate form over substance and allow parties to evade the pre-emptive scope of preemption by relabeling their contract claims as claims for tortious breach of contract." *Id.* at 542 U.S. at 214-15. The Court also rejected the court of appeals' finding that the language of the Plan was immaterial, noting that the duty imposed by the state statute was not external to rights under the respective plans. *Id.* at 215. And finally, the Court rejected the court of appeals' attempt to narrow the scope of ERISA preemption to only state law claims that duplicated the elements of a claim under ERISA. The Court found this narrow application of ERISA preemption inconsistent with its precedent and ultimately held:

> Congress' intent to make the ERISA civil enforcement mechanism exclusive would be undermined if state causes of action that supplement the ERISA 502(a) remedies were permitted, even if the elements of the state cause of action did not precisely duplicate the elements of an ERISA claim.

Id., 542 U.S. at 216.

The Court's unanimous *Davila* opinion clearly establishes the broad scope of ERISA preemption and the applicable legal analysis and public policy supporting its application.

II. THE SIXTH CIRCUIT FOLLOWED AND APPLIED *DAVILA* IN THE UNDERLYING DECISION.

The Sixth Circuit affirmed the District Court by simple application of *Davila*. The Sixth Circuit reviewed the nature and basis for the state law breach of contract claim, the plan documents, and Affiliation Agreement. The Sixth Circuit held that Petitioners' breach of contract claim related to an employee benefit plan and was clearly preempted.

> As in *Davila*, ERISA limits plaintiffs' ability to challenge a plan administrator's decision regarding benefits. . . . In this case, Fifth Third's decision to amend the ERISA plan, making its current employees beneficiaries at the expense of class members, is just as much a subject of ERISA regulations as the benefit determination in *Davila*. Such a determination goes to the heart of what Congress intended ERISA to govern: the rights of beneficiaries under ERISA against plan administrators. Fifth Third's decision to amend the ESOP (a decision clearly "related to" ERISA, 29 U.S.C. § 1144) constituted an element of Hutchison's state law claim, and no class member could sue Fifth Third before the decision to exclude him or her from the ESOP. There is, therefore, no basis for distinguishing in terms of

> ERISA preemption the actions that class members challenge here from those plaintiffs challenged in *Davila*.
>
> **As in *Davila*, it does not matter whether plaintiffs cite a different body of law to support their cause of action (state tort or contract law versus ERISA fiduciary responsibility) or whether the relief that plaintiffs seek is different from the relief that ERISA affords (damages for personal injury or breach of contract versus plan benefits under ERISA). As long as ERISA exclusively regulates the activity (deciding whether to award benefits), ERISA prevents the distinct state law tort scheme from superimposing an extra layer of regulation on top of the ERISA-regulated plan benefit determination. Just as the plaintiff in *Davila* sought to use a separate body of law – state tort law – to govern the plan determination at issue there, the plaintiffs in this case seek to use a separate body of law – state contract law – to govern the plan amendments at issue in this case.**

Hutchison, 469 F.3d at 588 (emphasis added) [Pet. at 11a-12a]. The Sixth Circuit further confirmed that its decision is entirely consistent with the public policy of ERISA.

> Allowing Hutchison's state-law claim to proceed could have an impact on this careful balancing because the plan administrator would have to evaluate beneficiaries' state-law claims before making decisions relating to the ERISA plans, and

> a threat of litigation from beneficiaries might discourage plan administrators from making decisions that are permissible under ERISA. In addition, allowing Hutchison's state-law claim to proceed might discourage the creation of employee benefit plans in the future.

Id. at 589 [Pet. at 13a]. The Sixth Circuit concluded that the District Court's decision was consistent with *Davila* and with Sixth Circuit authority both pre-*Davila* and post-*Davila*. *Id.* at 589-90 [Pet. at 11a-16a] (*citing Penny/Ohlmann/Nieman, Inc. v. Miami Valley Pension Corp.*, 399 F.3d 692 (6th Cir. 2005) and *Briscoe v. Fine*, 444 F.3d 478 (6th Cir. 2006)). The Sixth Circuit also confirmed that Petitioners separately pursued an ERISA claim which was dismissed and was not appealed, and that "ERISA prevents class members from re-casting their ERISA claim as a breach of contract claim by simply rephrasing the source of Fifth Third's obligations." *Hutchison*, 469 F.3d at 590 (*citing Davila*, 542 U.S. at 214) [Pet. at 16a].

III. THERE IS NO CIRCUIT SPLIT REGARDING ANY SUPPOSED "DUAL CAPACITY DOCTRINE" REQUIRING CLARIFICATION BY THIS COURT.

Petitioners' sole basis for certiorari is the Sixth Circuit's purported failure to employ an alleged "dual capacity doctrine" in analyzing ERISA preemption (Petition at 8-16) – an alleged doctrine that is not identified, much less adopted, as a doctrine in any case cited by Petitioners in their Petition.[4]

---

[4] Moreover, while Petitioners mentioned capacities, they never asked the District Court or the Sixth Circuit Court of Appeals to adopt this so-called "dual capacity doctrine."

Petitioners argue that this Court's decision in *Pegram v. Herdrich*, 530 U.S. 211 (2000) "laid the groundwork for the general acceptance of a 'dual capacity doctrine'" (Petition at 13); that "Petitioners' advocacy of such an analysis is consistent with the *Pegram* opinion" (Petition at 14); and that the cases purportedly employing a "dual capacity doctrine" are based upon the Court's explanation in *Pegram* (Petition at 14). Petitioners' argument should be rejected because: (a) this Court has already rejected an expansive reading of *Pegram* in its *Davila* decision; (b) the cases upon which Petitioners rely for the alleged "dual capacity doctrine" do not support acceptance of such a doctrine much less applicability of the doctrine/analysis to this case; and (c) the "dual capacity doctrine" is at odds with the scope of and public policy supporting ERISA preemption.

A. *This Court has limited, and not expanded, Pegram.*

Petitioners' extensive reliance on *Pegram* throughout its Petition is surprising given that this Court limited its *Pegram* holding in *Davila*. In *Davila*, Respondents and amici argued that some circuit courts of appeal were applying *Pegram* and finding that various state law causes of action did not relate to an employee benefit plan and should therefore not be preempted. *Davila*, 542 U.S. at 217-18. The Court rejected the argument and held that "*Pegram* cannot be read so broadly." *Id.* at 218. The Court limited the application of *Pegram* to truly "mixed eligibility and treatment decisions" involving medical care, distinguishing these claims from those advanced by the *Davila* petitioners, which were basic coverage/eligibility decisions based on the plan documents. *Id.* at 218-21.

Petitioners are effectively asking this Court to revisit *Davila* and reconsider its narrowing of *Pegram* – but Petitioners can cite no post-*Davila* circuit court confusion regarding the narrowing of *Pegram* or post-*Davila* circuit court confusion regarding the appropriate analytical framework for applying ERISA preemption. Petitioners simply disagree with the Court's *Davila* holding, but their disagreement, standing alone, is not grounds for certiorari review of this matter.

B. *Petitioners' Reliance on Pre-Davila Case Law is Misplaced.*

Petitioners offer contradicting characterizations of the so-called "dual capacity doctrine" – on one hand intimating that *Pegram* laid the "groundwork for acceptance" of the doctrine (Petition at 12-16), while at the same time representing that the doctrine has already been used and accepted by more than half the circuit courts of appeals (Petition at 8). If true, it is difficult to understand why no case cited by Petitioners outlines a "dual capacity doctrine" or defines its parameters. Petitioners' "dual capacity doctrine", at best, is nothing more than a description of certain courts' application of basic ERISA preemption analysis to the facts of a particular case.

Petitioners rely primarily on two cases – *Abraham v. Norcal Waste Systems, Inc.*, 265 F.3d 811 (9th Cir. 2001), *cert. denied*, 535 U.S. 1015 (2002) and *Somners Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456 (5th Cir. 1986) – which are factually distinguishable and legally irrelevant. These decisions, both pre-*Davila*, applied basic ERISA preemption analysis and

ultimately held, on the facts presented, that the claims alleged by the plaintiffs in the respective cases were independent of and did not relate to an ERISA Plan. Those holdings have no relevance to this case, where the District Court and the Sixth Circuit both concluded that Petitioners' breach of contract claim goes to the heart of the Plan fiduciary (Fifth Third) – Plan participant (Petitioners) relationship, and is inextricably intertwined with the Suburban ESOP.

The Sixth Circuit had previously determined that a breach of contract claim against a record keeper was not preempted (*PONI*) – and distinguished the non-preempted breach of contract claim in *PONI* from the breach of contract claim preempted in the underlying case, finding the circumstances "entirely different." *Hutchison*, 469 F.3d at 589 [Pet. at 15a]. In both cases, the Sixth Circuit applied ERISA preemption analysis, analyzed the basis and nature of the claims and the relevant documents, and determined whether the claims were preempted or not. *Id.* at 589-90. Petitioners cannot actually identify any error in the legal analysis itself; they simply do not like the result in their case.

Petitioners cite no circuit court case law establishing or identifying an actual conflict regarding any doctrine or element of ERISA preemption, much less a conflict post-*Davila*, that requires clarification by this Court at this time.[5]

---

[5] Furthermore, while Petitioners rely heavily upon the Fifth Circuit Court of Appeals' decision *Somners*, they fail to bring to the Court's attention the Fifth Circuit's subsequent decision in *Haliburton Co. Benefits Comm. v. Graves*, 463 F.3d 360 (5th Cir. 2006), *petition for rehearing en banc denied and decision clarified*, 479 F.3d 360 (5th Cir. 2007), cited by the Sixth Circuit in its *Hutchison* decision, which is more directly on point. In *Haliburton*,

(Cont'd)

C. *Allowing Petitioners' State Law Breach of Contract Claim to Proceed Would Defeat the Fundamental Purpose of ERISA Preemption.*

Petitioners' claim is not remotely similar to a "mixed eligibility treatment decision" at issue in *Pegram* or to a breach of contract claim against a non-fiduciary (at issue in *PONI*). Petitioners' breach of contract claim directly involves the interpretation of an agreement for the handling of assets within the Suburban ESOP. Petitioners want to require the Plan Administrator to take specific action under the Suburban ESOP Plan. Petitioners are former participants in the Suburban ESOP, and Fifth Third is the sponsor, the employer, and the fiduciary of the Suburban ESOP. Regardless of the body of law or the nature of the relief sought, Petitioners' breach of contract claim clearly "relates to" the ESOP Plan and triggers ERISA preemption.

Significantly, Petitioners were not left remediless by application of ERISA preemption – they pursued their ERISA breach of fiduciary duty claim on this matter and lost on the

---

(Cont'd)

the plaintiffs brought an ERISA claim for breach of fiduciary duty arising out of a merger agreement and retiree health insurance – the court of appeals recognized that

> "[t]he Retirees are not seeking to enforce a breach of contract claim under the merger agreement. As they recognize, principles of preemption prevent them from doing so. *Metro Life Ins. Co. v. Taylor*, 481 U.S. 58, 82 (1987) (holding that a contract claim is preempted by ERISA if the claim relates to an employee benefit plan."

Haliburton, 463 F.3d at 375.

merits when the District Court found that Fifth Third did not breach the Affiliation Agreement or any fiduciary duty owed to Petitioners. Petitioners had their day in Court; lost on the merits; and chose not to appeal this decision. Petitioners cannot be allowed to evade the scope of ERISA preemption, and the District Court's ruling on the merits of their ERISA breach of fiduciary duty claim, by rephrasing their claim under state law and beginning anew. *Davila*, 542 U.S. at 215; *Hutchison*, 469 F.3d at 590 [Pet. at 16a]. Allowing Petitioners' claim to proceed would directly undermine the careful balancing of rights and remedies established by Congress in enacting and defeat the basic, fundamental purpose and goal of ERISA and ERISA preemption. *Davila*, 542 U.S. at 207-08.

CONCLUSION

Petitioners have not established any compelling reasons for the Court to grant the Petition. Therefore, Fifth Third respectfully requests that the Petition be denied.

Respectfully submitted,

PATRICK F. FISCHER
Counsel of Record
JOSEPH M. CALLOW, JR.
SUE A. ERHART
KEATING MUETHING & KLEKAMP PLL
One East Fourth Street, Suite 1400
Cincinnati, Ohio 45202
(513) 579-6400

Counsel for Respondent

APPENDIX

APPENDIX — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION DATED OCTOBER 7, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. 1:01-CV-789

JOSEPH F. HUTCHISON, *et al.*,

Plaintiffs,

v.

FIFTH THIRD BANCORP,

Defendant.

ORDER

BECKWITH, Chief J.

This matter is before the Court on Plaintiff Joseph Hutchison, *et al.*'s motion for class certification (Doc. No. 62) and motion for summary judgment (Doc. No. 75) and Defendant Fifth Third Bancorp's motion for summary judgment (Doc. No. 71) and motion to strike Plaintiffs' motion for class certification (Doc. No. 80). For the reasons that follow, Plaintiffs' motion for summary judgment is not well-taken and is DENIED; Defendant's motion for summary judgment is well-taken and is GRANTED; Plaintiffs' motion for class certification and Defendant's motion to strike Plaintiffs' motion for class certification are MOOT.

Appendix

I. *Background*

The facts essential to resolution of this lawsuit are undisputed. Plaintiffs contend that Defendant Fifth Third Bancorp ("Fifth Third") breached its fiduciary duty under the Employee Retirement Income Security Act ("ERISA") when it amended the Suburban Banccorporation Employee Stock Ownership Plan ("the ESOP") to allow participation in the plan by Fifth Third employees. The Court finds no breach of fiduciary duty in this action, and, consequently, Plaintiffs' claims are without merit.

The Court has set forth the factual background of this lawsuit in a series of orders. Doc. Nos. 9, 24, 46, 90. Therefore, only a brief summation of the facts is required.

Fifth Third and Suburban Banccorporation ("Suburban") merged in 1997. At the time of the merger, Suburban maintained a leveraged employee stock ownership plan for the benefit of its employees. Fifth Third did not want to continue the ESOP after the merger was consummated. Suburban on the other hand, wanted to find a way to distribute the excess shares of Suburban stock in the plan to Suburban employees. The parties both recognized, however, that Suburban might not be able to complete the distribution of stock to the participants without violating Internal Revenue Code restrictions on maximum annual contributions. Accordingly, the affiliation agreement between Fifth Third and Suburban provided in pertinent part:

> Suburban Bancorp shall develop a written description and timetable which shall be provided

to and approved by Fifth Third and its counsel, setting forth all actions necessary to: (i) make contributions to the Suburban Bancorp, Inc. Employee Stock Ownership Plan ("ESOP") and/or have the ESOP sell unallocated shares under the ESOP to fully repay the ESOP's existing loan, all in compliance with the applicable requirements of ERISA and the Internal Revenue Code, including Code Sections 415 (as interpreted by the IRS in Private Letter Rulings 9648054 and 9426048) and 404; (ii) amend the ESOP to authorize the sale of unallocated shares to repay the loan, to provide for allocation of gain on the sale of unallocated shares in a manner that complies with the position of the IRS in Private Letter Rulings 9648054 and 9426048 and to make such other changes as may be necessary to implement the termination; (iii) terminate the ESOP; and (iv) submit the ESOP to the Internal Revenue Service for a determination letter that the ESOP, as so amended and terminated, continues to be a qualified retirement plan and employee stock ownership plan under Sections 401(a) and 4975(e)(7) of the Code. Upon development and approval by Fifth Third of said written description and timetable, Suburban Bancorp shall take such actions as described therein as are approved by Fifth Third. Distribution of the shares and any other assets of the ESOP shall (i) not occur until after the receipt of the foregoing IRS determination letter and (ii) occur prior to the Effective Time only with

the express written consent of Fifth Third, which shall not be unreasonably withheld. In connection with the development of the written description and timetables referred to above and resolution of the ESOP, the parties agree they intend that, to the extent not prohibited by applicable law, the ESOP shall be maintained through the date of its final termination for the exclusive benefit of the individuals who had become ESOP participants on or before the Effective Time. In furtherance of this intention, such timetable and plan shall include provisions: (a) that Suburban Bancorp may make contributions to the ESOP for the plan year ending June 30, 1997 in the amount accrued in the ordinary course through February 28, 1997; (b) That Suburban may make contributions to the ESOP for the plan year ending June 30, 1997, in the amount accrued and to be accrued in the ordinary course from March 1, 1997, through June 30, 1997, but in no event greater than $42,000 and in no event may any amount be contributed that would create or increase an amount in the ESOP suspense account which, under the written description and timetable referred to above (assuming termination of the ESOP on June 30, 1998) may not be allocated within the limits of Code section 415 (as interpreted by the IRS in Private Letter Rulings 9648054 and 9426048); (c) that no interest shall accrue on the existing ESOP loan after June 30, 1997; and (d) that the ESOP shall terminate no later than June 30, 1998 if at that time there would be no amount in the ESOP

suspense account which may not be allocated within the limits of Code section 415 (as interpreted by the IRS in Private Letter Rulings 9648054 and 9426048). If, upon development of the written description and timetable referred to above, the parties agree in good faith that allocation of all or any shares of stock in the ESOP's suspense account would violate the Code's section 415 limitations as interpreted by the IRS in Private Letter Rulings 9648054 and 9426048, Suburban Bancorp shall apply to the IRS for approval (either through an IRS determination letter or other means reasonably acceptable to Fifth Third) of a transaction (the "Transaction") whereby the excess shares (or cash value thereof) (i.e., those shares remaining after fully utilizing the section 415 limits (as interpreted by the IRS in Private Letter Rulings 9648054 and 9426048) either revert to Fifth Third or are transferred to an employee benefit plan of Fifth Third. If and only if the IRS approves such a Transaction, or Fifth Third otherwise proceeds with the Transaction without IRS approval, Fifth Third will thereafter pay (out of its corporate assets and not plan assets) an equivalent amount (determined using the fair market value of the transferred plan assets at the time of the transfer), reduced by expenses incurred, to individuals who were ESOP participants on the Effective Time and who shall divide such payment pro rata based on their relative ESOP account balances on June 30, 1997.

Doc. No. 71, Ex. 7, Affiliation Agreement § V.E.1.

Suburban, however, was not able to develop a plan in which the remaining shares in suspense could be distributed to the participants. Nor did Suburban obtain an IRS determination letter approving a reversion of the shares to Fifth Third. Under this scenario, pursuant to the terms of § V.E.1., Fifth Third would have been required to pay the participants out of corporate assets an amount equal to the fair market value of the shares. Instead, in order to close the ESOP, Fifth Third amended the plan to make existing Fifth Third employees eligible to participate in the ESOP. Fifth Third then distributed the remaining shares in suspense to the participants and terminated the ESOP. Some of the participants rolled over their ESOP distribution to other Fifth Third retirement plans.

Plaintiffs, who are former Suburban employees and original participants in the ESOP, contend that Fifth Third effected a transfer of ESOP assets when it amended the plan to allow Fifth Third employees to become participants. Therefore, Plaintiffs claim that pursuant to § V.E.1. of the Affiliation Agreement, Fifth Third is obligated to pay them the value of the shares distributed out of corporate assets.

As the Court indicated in previous orders, Plaintiffs asserted a variety of state law claims against Fifth Third to recover the value of the stock. The Court, however, found that each of Plaintiffs' state laws claims is preempted by ERISA. Remaining for disposition is Plaintiffs' claim that Fifth Third breached its fiduciary duty under ERISA, 29 U.S.C. § 1104, to maintain the ESOP for the exclusive benefit of the original ESOP participants in accordance with the intent of the Affiliation Agreement. In turn, this claim

has two alternative components. Plaintiffs first contend that Fifth Third engaged in a prohibited transaction involving an exchange of property with a party in interest. Alternatively, Plaintiffs argue that the Court should use its equitable powers to create a resulting trust or plan to carry out the intent expressed in the Affiliation Agreement that the ESOP benefit only its original participants.

The parties have submitted cross-motions for summary judgment on the issue whether Fifth Third has any obligation to pay Plaintiffs for the value of the shares distributed as a result of the ESOP amendments. Additionally, Plaintiffs have filed a motion to certify a class of plaintiffs consisting of the original ESOP participants. Fifth Third has moved to strike Plaintiffs' motion for class certification on the grounds that it was filed out of time.

II. *Summary Judgment Standard of Review*

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The evidence presented on a motion for summary judgment is construed in the light most favorable to the non-moving party, who is given the benefit of all favorable inferences that can be drawn therefrom. *United States v. Diebold, Inc.*, 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). "The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement

is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (emphasis in original). The Court will not grant summary judgment unless it is clear that a trial is unnecessary. The threshold inquiry to determine whether there is a need for trial is whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250. There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. *Id.*

The fact that the weight of the evidence favors the moving party does not authorize a court to grant summary judgment. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 472, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). "[T]he issue of material fact required by Rule 56(c) . . . to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or a judge to resolve the parties' differing versions of the truth at trial." *First National Bank v. Cities Service Co.*, 391 U.S. 253, 288-89, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968).

Moreover, although summary judgment must be used with extreme caution since it operates to deny a litigant his day in court, *Smith v. Hudson*, 600 F.2d 60, 63 (6th Cir.), *cert. dismissed*, 444 U.S. 986, 100 S.Ct. 495, 62 L.Ed.2d 415 (1979), the United States Supreme Court has stated that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral

part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). According to the Supreme Court, the standard for granting summary judgment mirrors the standard for a directed verdict, and thus summary judgment is appropriate if the moving party establishes that there is insufficient evidence favoring the non-moving party for a jury to return a verdict for that party. *Id.* at 323; *Anderson*, 477 U.S. at 250.

Accordingly, summary judgment is clearly proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. Significantly, the Supreme Court also instructs that the "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion" against a party who fails to make that showing with significantly probative evidence. *Id.*; *Anderson*, 477 U.S. at 250. Rule 56(e) requires the non-moving party to go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." *Id.*

Further, there is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or similar materials negating the opponent's claim. *Id.* Rule 56(a) and (b) provide that parties may move for summary judgment "with or without supporting affidavits." Accordingly, where the non-moving party will bear the burden of proof at trial on a dispositive issue, summary

judgment may be appropriate based solely on the pleadings, depositions, answers to interrogatories, and admissions on file.

III. *Analysis*

As indicated, Plaintiffs claim that Fifth Third breached its fiduciary duty to the original ESOP participants by amending the plan to allow a distribution of plan assets to new Fifth Third employee-participants.

It is well-established, however, that an employer does not act in a fiduciary capacity when it adopts plan amendments. *Lockheed Corp. v. Spink*, 517 U.S. 882, 890, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996). Therefore, Fifth Third cannot be held liable for breach of fiduciary duty for the mere fact that it amended the ESOP to allow new participants into the ESOP. *Id.*; *see also Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 442-44, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999).

Nor did Fifth Third engage in a prohibited transaction with a party or parties in interest when it amended the plan and distributed ESOP assets to new participants. ERISA forbids plan fiduciaries from engaging in transactions with parties in interest. 29 U.S.C. § 1106(a)(1). These so-called prohibited transactions include, and indeed appear to be limited to, those transactions listed in § 1106(a)(1): (A) sale or exchange, or leasing, of any property between the plan and a party in interest; (B) lending of money or other extension of credit between the plan and a party in interest; (C) furnishing of goods, services, or facilities between the

plan and a party in interest; (D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or (E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title. *See id.*; *Jordan v. Michigan Conf. of Teamsters Welfare Fund*, 207 F.3d 854, 858 (6th Cir.2000) (stating that § 1106 should be interpreted narrowly). Subsections (A) or (D) of § 1106(a)(1) have the most applicability here, but the payment of benefits to participants pursuant to the terms of an otherwise lawful plan is not a violation of § 1106(a)(1). *See Spink*, 517 U.S. at 892. This remains true even if Fifth Third gained some incidental benefit from the distribution of assets, such as increasing employee compensation without increasing wages. *See id.* at 893-94. Thus, by distributing ESOP assets to new plan participants, Fifth Third did not execute a prohibited transaction.

Thus remaining is Plaintiffs' contention that the Court should use its equitable powers to impose a resulting trust on the distributed ESOP shares to effectuate the intent expressed in the Affiliation Agreement that the ESOP was intended to benefit only its original participants. Plaintiffs are limited to obtaining an injunction or other appropriate equitable relief upon demonstrating a breach of fiduciary duty. *Allinder v. Inter-City Prod. Corp. (USA)*, 152 F.3d 544, 551-52 (6th Cir.1998). Nevertheless, before the Court can impose a resulting trust, it must still find some breach of fiduciary duty by Fifth Third before such relief can be granted. This record demonstrates, however, that Fifth Third did not breach its fiduciary duty to Plaintiffs. Assuming without deciding that the Affiliation Agreement became one of the

terms of the ESOP, and it was the intent of the agreement that the ESOP should benefit only the original participants, Fifth Third still committed no fiduciary breach when it amended the plan as it did. It is undisputed that in the plan document, the employer reserved the right to amend any or all of the plan's provisions at any time. *See* Doc. No. 71, Ex. 4, Plan Document § 16.1. As the Court noted in *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir.1998), it is not incompatible, and certainly no breach of fiduciary duty, to extend the promise of a benefit in one hand while reserving the right to withdraw the benefit in the other. *Id.* at 401. Hence, there was no breach of fiduciary duty by Fifth Third even assuming the plan amendments disregarded the intent allegedly expressed in the Affiliation Agreement.

Again assuming that the Affiliation Agreement became one of the terms of the ESOP, Fifth Third was not obligated to pay Plaintiffs for the distributed suspense shares. Fifth Third was only required to pay Plaintiffs if plan assets reverted to Fifth Third or were transferred to another Fifth Third plan. The assets clearly did not revert to Fifth Third because they were distributed among the group of employee-participants. Moreover, as Fifth Third correctly points out, amending the plan to allow additional participants does not create a new plan. *Hughes*, 525 U.S. at 442-43. Lastly, even though some ESOP participants rolled over their ESOP distributions to other Fifth Third retirement plans, this is not considered to be a transfer of plan assets to another plan. *See* 26 C.F.R. § 1.401(a)(31)-1 (2005); 26 U.S.C. § 414(1). Thus, there was no transfer of plan assets which triggered a duty by Fifth Third to pay Plaintiffs.

Appendix

Conclusion

In summary, the record demonstrates that Fifth Third did not breach any fiduciary duty owed to Plaintiffs. Accordingly, Fifth Third's motion for summary judgment is well-taken and is **GRANTED**; Plaintiffs' motion for summary judgment is not well-taken and is **DENIED**. As a result of this ruling, Plaintiffs' motion for class certification and Fifth Third's motion to strike Plaintiffs' motion for class certification are **MOOT**. The second amended complaint is **DISMISSED WITH PREJUDICE. THIS CASE IS CLOSED**.

IT IS SO ORDERED.

Date October 7, 2005

s/ Sandra S. Beckwith
Sandra S. Beckwith, Chief Judge
United States District Court